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No. 98-673

In The

Supreme Court of the United States

October Term, 1998

KORDICE M. DOUGLAS,

Petitioner,

versus

DYNMcDERMOTT PETROLEUM OPERATIONS COMPANY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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A. Introduction.

The Petitioner's Reply and Supplemental Briefs, as well as the dissent filed below, misread the narrow scope of the Fifth Circuit's opinion and advance an untenable rule that would allow an employed attorney who has unethically revealed client confidences extrajudicially, making no attempt to protect the confidences, to then cite that unethical behavior as a "protected activity" under Title VII. The opinion below does not deny employed attorneys the protection of Title VII nor does it prevent them from using client confidences to prove a Title VII violation *if* the attorney seeks, from a judge or appropriate tribunal, the appropriate protections of these confidences.

The opinion below was narrowly written and carefully crafted. It is in accord with decisions of this Court. It is not inconsistent with other rulings of the Fifth Circuit and does not misconstrue Rule 1.6 of the Louisiana Rules of Professional Conduct, and in any event these matters are not appropriate issues for this Court's review.

B. The Opinion Below Is Narrow

In the process of attempting to characterize the Fifth Circuit's opinion as broad and far ranging, the Petitioner and the dissent both make statements that are at odds with the record. The dissent asserts that the Petitioner might have been in the process of considering treating her five-page response as a whistle-blower complaint. There is no question that the Department of Energy's ("D.O.E.") Richard O'Neill, who received Ms. Douglas'

five-page "response" revealing confidences, testified Petitioner informed him at the time that it was *not* a whistleblower complaint. Tr. 409, 412. Likewise, contrary to the dissent's assertion that the jury was properly instructed, issues raised by DynMcDermott on the appeal below[1]

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[1] The Issues on Appeal, below, included:

* * * 4. Is it reversible error for the trial court to refuse to allow the Defendants to present to a lay jury expert testimony on the lawyer's duty of confidentiality and loyalty, the attorney-client privilege and his opinion as to whether the plaintiff breached her duties when:

a. the defendants believed in good faith that plaintiff had violated her ethical responsibilities and, thereafter, terminated her for these violations.

b. the plaintiff, a practicing lawyer, was permitted to testify as to her understanding and interpretation of these same duties and privileges.

5. Is it reversible error for the trial court to:

a. instruct the jury to decide whether an in-house counsel who reveals confidential and privileged information was engaged in a "protected activity" under Section 704(a) of Title VII of the Civil Rights Act [and]

b. fail to properly instruct the jury on the issues of:

i. the meaning of "protected activities" under Section 704(a) of Title VII;

ii. the specific duties of confidentiality and loyalty;

iii. the specific duty of corporate counsel;

iv. [the] meaning of confidential information protected from disclosure by attorneys without client consent;

v. the distinction between privileged and confidential information.

explicitly included: the trial court's improper jury instructions on client confidences; the failure of the trial court to allow expert testimony on the ethical rules governing lawyers as well as the standard of care lawyers must exercise to protect client confidences; and the failure of the court to properly instruct the jury on the meaning of a "protected activity," the very issue which the Petitioner now asserts as the basis of this writ application.

Petitioner did not seek a review by this Court of whether confidences were revealed; rather this matter is explicitly conceded[2] by Petitioner and implicitly by the dissent.[3] Their fall-back argument is that confidences were somehow "waived" by the D.O.E. contract; however, while the contract contains language about certain waivers relating to documents, there is nothing about waiving attorney-client confidences, and there is nothing that allows the D.O.E. to question either DynMcDermott or its in-house attorneys about oral confidential communications, to compel disclosure of such items, or to

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[2] Indeed, the first "Question Presented" by Petitioner is whether in-house counsel is protected under Title VII for "engaging in activities opposing discrimination *if, in doing so, she discloses confidential client information.*" (Emphasis supplied).

[3] The argument in both the Petitioner's Supplemental Brief (p. 2) and the dissent that there was allegedly "no harm . . . from Douglas's statements" is a concession that these statements breached confidences. Of course, "harm" of a disclosure is neither a test of nor a defense to whether information is confidential and must be assiduously protected by counsel; all confidences are protected.

require DynMcDermott or its in-house counsel to create documents containing such confidences.

Under the facts in this case, where the alleged "protected activity" consisted solely of disclosure of client confidences – a disclosure not incidental to some other protected activity, but a continued revelation of confidential information that is the only protected activity claimed – the Fifth Circuit's ruling is narrow and justified. The Fifth Circuit's opinion was cautious and limited in its approach. It held that Petitioner "did not surrender her Title VII rights when she signed on with DynMcDermott as its in-house counsel" 144 F.3d at 376. It further held when the "specific right asserted" is to oppose allegedly unlawful practices *"in a manner* that violates the ethical duties" of the profession,[4] then and only then does the scale tip in favor of the employer's legitimate business interests. This ruling, allowing an execution of the balancing test by a legal analysis (in lieu of a full-fledged trial) or in a post-trial ruling, is entirely congruent with opinions from the First, Fourth, and Ninth circuits, all of which have held that this type of determination may be made in summary proceedings. *Hochstadt v. Worcester Foundation for Experimental Biology,* 545 F.2d 222 (1st Cir. 1976) (denial of preliminary injunction); *Laughlin v. Metropolitan Washington Airports Authority,* 149 F.3d 253 (4th Cir. 1998) (summary judgment); *O'Day v. McDonnell Douglas Helicopter Company,* 79 F.3d 756 (9th Cir. 1996) (summary judgment). In each of these decisions the circuit court held as a matter of law that the case should not proceed further because the employee's actions were not

[4] *Id.*, emphasis supplied.

within the realm of a "protected activity" and/or because the discharge had a legally non-discriminatory basis.

Once individuals become members of the Bar, their professional and ethical obligations to protect their clients' confidences and privileges become paramount. For example, an attorney may not rely upon the First Amendment as a basis to breach either client confidences or privileges. *Cf. Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1052 (1991). Likewise, the right to practice as an attorney and to represent clients must give way to the obligation to protect confidences. *Chugach Electrical Association v. United States District Court*, 370 F.2d 441, 444 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967). Accord: *Doe v. A Corporation*, 709 F.2d 1043, 1047 (5th Cir. 1983); *Kurbitz v. Kurbitz*, 468 P.2d 673 (Wash. S.Ct. 1970). All the Fifth Circuit did was to recognize this paramount obligation and hold that an attorney may not breach confidences and then seek shelter under the umbrella of Title VII from the fallout of the very action that constituted the breach.

C. The Ruling Is Not Inconsistent With The Decisions of This Court

Petitioner and the dissent assert that the Fifth Circuit's ruling is contrary to the holdings of what they term the "McDonnell Douglas-Burdine-Hicks" framework.[5] The essence of their argument is that once an in-house

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[5] *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973); *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). To this grouping the dissent also adds *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996).

attorney has made a claim of "protected activity," that attorney is entitled automatically to proceed to trial and no post-judgment evaluation of the legal basis for the asserted protected activity is allowed. This argument distorts the law.

It must be remembered that the legal issue to which the writ of certiorari is directed primarily involves whether the disclosure of confidential client information is a "protected activity." Thus, despite the extensive exegesis in the Petitioner's Supplemental Brief and the dissent about this Court's three cases beginning with *McDonnell Douglas,* the question is not whether the trial court should have let the jury determine if Petitioner was terminated because of sexual or racial discrimination, but rather whether legally there was any issue of a "protected activity" that should have gone to the jury. If the activity is not "protected," it is not actionable. Here, the "protected activities" were alleged to consist of only the oral and written disclosure of confidences, an extremely narrow and circumscribed situation.

This Court's trilogy of cases (none of which involve the issue of protected activities) has been interpreted to allow summary judgments in favor of employers even after the plaintiff has established a *prima facie* case. *Woods v. Friction Materials,* 30 F.3d 255 (1st Cir. 1994). There is no basis for the Petitioner or dissent to assert that every single issue must always go to the jury or that a F.R.C.P. Rule 50 post-trial motion for judgment as a matter of law is impermissible. *Cf. Binder v. Long Island Lighting Co.,* 57 F.3d 193 (2nd Cir. 1995).

The dissent's statements that the Opinion "unfairly truncates" the burden of proof and provides some type of wholesale exclusion of in-house counsel from Title VII's protections accords with neither the express language of the Panel nor the permissible and ethical methods by which the Panel indicated in-house counsel could vindicate their legal rights. As noted above, what is a "protected activity" can even be decided in summary proceedings as a legal issue. Further, the Panel expressly held that in-house counsel retain Title VII rights and suggested several methods by which such lawyers could fully exercise their rights without disclosing confidences or breaching their ethical duties. 144 F.3d at 375, fn. 12.

D. The Ruling Is Not Inconsistent With The Decisions of The Fifth Circuit

While the dissent argues that the Panel opinion either "departs" from or "overrules" several Fifth Circuit opinions, this argument does merit this Court's review, for there is no dispute among the circuits on this issue. In fact, the Panel opinion does not overrule *Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986), *cert denied*, 479 U.S. 1065 (1987) or *Doe v. A Corporation*, 709 F.2d 1043 (5th Cir. 1983); rather, it explicitly cites and relies upon these decisions. 144 F.3d at 373-75.

E. The Interpretation of Rule 1.6 is Not An Issue Worthy of Review

Whether the appellate court properly construed Louisiana Rule of Professional Conduct 1.6 is not an issue that

merits this Court's review.[6] No conflict with any decision of the Louisiana Supreme Court, or for that matter, any other court is even intimated by Petitioner.

CONCLUSION

As Judge Jolly noted in his "Response to Dissent From The Denial of Rehearing En Banc," the Panel opinion does not reach "the result the dissent alleges"; rather it recognizes several valid means of dealing with confidential information in the exercise of Title VII rights and the filing of suits by in-house counsel, none of which the Petitioner even considered or attempted to use.

This case does not merit this Court's review.

Respectfully submitted,

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[6] It should be noted that the dissent discusses the Comments to the ABA Model Rules of Professional Conduct; Louisiana did not adopt the Comments or incorporate them even by reference.